FEDERAL SERVICE IMPASSES PANEL

1900 E Street NW, Washington, D.C. 20415

Release No. 66 July 8, 1976

VOLUNTARY SETTLEMENT REACHED DURING FINAL ACTION HEARING

A settlement of a negotiation dispute affecting approximately 1,800 employees of the United States Marshals Service has been announced by the Federal Service Impasses Panel. The agreement in Department of Justice, U.S. Marshals Service, Washington, D.C. and International Council of U.S. Marshals Service Locals, American Federation of Government Employees, AFL-CIO (Case No. 75 FSIP 38, June 23, 1976) was reached on June 22, 1976, during a hearing before a three-member subpanel of the Panel consisting of Chairman Robert G. Howlett and Members Albert L. McDermott and James C. Vadakin.

The Panel had directed the impasse to factfinding on issues relating to disciplinary actions, scope of the grievance procedure, merit promotions, overtime and standby, and use of official time. (Panel Release No. 60.) Prior to the factfinding hearing before a member of the Panel's staff, however, several of these issues were resolved. Accordingly, the Panel's four postfactfinding recommendations concerned overtime and standby, and the scope of the grievance procedure. (A copy of the Panel Report and Recommendations for Settlement is attached.) Two of the recommendations

were accepted by both parties. Because the impasse continued with respect to the other recommendations, the Panel scheduled a final action hearing in accordance with its authority under Executive Order 11491, as amended, to take whatever action it deems necessary to bring a dispute to settlement. It was at this hearing that the parties resolved the remaining issues, using the Panel's recommendations as the foundation for the final agreement terms. The agreement, the parties' first, will apply to some 1,400 U.S. Marshals and 400 clerical personnel in a worldwide bargaining unit.

For further information,
telephone (202) 632-6280.

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF JUSTICE U.S. MARSHALS SERVICE WASHINGTON, D.C. and INTERNATIONAL COUNCIL OF U.S. MARSHALS SERVICE LOCALS AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO	Case No. 75 FSIP 38

PANEL REPORT AND RECOMMENDATIONS FOR SETTLEMENT

Appearances:

For U.S. Marshals Service:

Kenneth C. Holecko,	Chief, Labor-Management Relations Section U.S. Marshals Service Washington, D.C.
Katherine F. Morland,	Labor-Management Relations Specialist U.S. Marshals Service Washington, D.C.

For International Council of U.S. Marshals Service Locals, AFGE:

Robert L. Richardson,	Contract Negotiation Specialist American Federation of Government Employees, AFL-CIO Washington, D.C.
John J. Steinheimer,	Chief of Negotiating Committee Local 2535, American Federation of Government Employees, AFL-CIO Southern District of New York New York, New York

The International Council of U.S. Marshals Service Locals, American Federation of Government Employees, AFL-CIO (the Union), filed a request with the Federal Service Impasses Panel (the Panel) on November 28, 1975, to consider a negotiation impasse under section 17 of Executive Order 11491, as amended (the Order). The request arose out of labor agreement negotiations between the Union and Department of Justice, U.S. Marshals Service (the Employer).

On December 11, 1975, the Panel determined that resolution of the impasse required factfinding. By letter and Notice of Hearing, it appointed Edward E. Potter to conduct a factfinding hearing on issues concerning use of official time, scope of the grievance procedure, disciplinary action, merit promotion, and overtime and standby.

A hearing was held before Factfinder Potter on January 20, 21, 22 and 23, 1976, in Washington, D.C. A stenographic record was taken; testimony and argument were presented; and the parties also submitted documentary evidence. Posthearing briefs were filed by the parties on February 20, 1976. The factfinder's report was issued on February 27, 1976; comments on the report were received from the Union on March 11, 1976.

BACKGROUND

1. The Employer

The U.S. Marshals Service is charged with a wide range of Federal law enforcement responsibilities involving the service of criminal and civil process. Its functions include serving warrants of arrest; movement of Federal prisoners; protection of witnesses; seizure and disposal of property under court order; maintenance of the security of Federal court facilities, judges, and jurors; and prevention and control of civil disturbances.

The Marshals Service is composed of 94 districts which conform to the Federal District Court system. Each district is headed by a U.S. Marshal who is appointed by the President and who heads a staff of Deputy U.S. Marshals and clerical personnel. The average office contains approximately 15 deputy marshals although the Southern District of New York, Chicago, Los Angeles, San Diego, and New Orleans have 40 to 50 deputies each. Over 200 deputy marshals are assigned to the Washington, D.C., office.

2. The Union

The Union represents approximately 1,400 Deputy U.S. Marshals and 400 clerical personnel. It achieved recognition as the bargaining representative for all nonprofessional employees of the U.S. Marshals Service, worldwide, including intermittent and term deputies, on August 20, 1974. The Union has approximately 35 locals ranging in size from 10 to 100 members; about two-thirds of its membership is in the larger cities.

3. The Current Negotiations

Negotiations for a first collective bargaining agreement began on October 20, 1975. Between that date and November 14, 1975, there were 16 bargaining sessions of which the last 3 were attended by a Federal mediator. The parties were able to reach agreement on numerous contract terms but were unable to resolve the issues identified in the Notice of Hearing.

Subsequently, during the course of the prehearing conference and factfinding hearing, the parties resolved the issues concerning use of official time, disciplinary action, merit promotion, and some of the issues relating to overtime and standby. Left unresolved were three issues concerning overtime and standby, and one relating to the scope of the grievance procedure.

OVERTIME AND STANDBY

The issues at impasse concern Union proposals that the Agreement provide that: (1) hours of work in excess of 8 hours a day and all hours in excess of 40 hours in one administrative workweek shall be overtime and that all overtime shall be paid at the appropriate rate of pay; (2) all overtime assignments will be made by the Employer in a fair and equitable manner; and (3) the Employer will not assign or permit an employee to work overtime on an "administratively uncontrollable overtime" basis solely to avoid paying any employee "regular overtime."

1. Background

a. The Statutory Basis for Overtime Payment

Federal overtime legislation authorizes two distinct forms of compensation. 5 U.S.C. § 5542(a)(Supp. II, 1972) provides that regular overtime (including regularly scheduled overtime) for full-time, part-time, and intermittent employees will be compensated at an hourly rate equal to 1 1/2 times the employee's basic hourly compensation up to GS-10 for "hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day."

5 U.S.C. § 5545(c)(2)(1970) provides for a second category of overtime payment, hereinafter referred to as administratively uncontrollable overtime or AUO. It states:

> (c) The head of an agency, with the approval of the Civil Service Commission, may provide that—
>
> . . . . . .
>
> (2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with

> the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is determined as an appropriate percentage, not less than 10 per centum nor more than 25 per centum, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10, by taking into consideration the frequency and duration of irregular unscheduled overtime duty required in the position. [Emphasis added.] (Emp. Exh. 6.)

A Civil Service Commission regulation, 5 C.F.R. § 550.153 (1976), establishes the basis for determining positions for which premium pay for administratively uncontrollable overtime is authorized. It provides in pertinent part:

> § 550.153 Bases for determining positions for which premium pay under § 550.151 is authorized.1/
>
> (a) The requirement in § 550.151 that a position be one in which the hours of duty cannot be controlled administratively is inherent in the nature of such a position. . . .
>
> (b) In order to satisfactorily discharge the duties of a position referred to in § 550.151, an employee is required to perform substantial amounts of irregular or occasional overtime work. In regard to this requirement:
>
> (1) A substantial amount of irregular or occasional overtime work means an average of at least 3 hours a week of that overtime work.
>
> (2) The irregular or occasional overtime work is a continual requirement, generally averaging more than once a week.
>
> (3) There must be a definite basis for anticipating that the irregular or occasional overtime work will continue over an appropriate period with a duration and frequency sufficient to meet the minimum requirements under subparagraphs (1) and (2) of this paragraph.
>
> (c) The words in § 550.151 that an employee is generally "responsible for recognizing, without supervision, circumstances which require him to remain on duty" mean that:
>
> (1) The responsibility for an employee remaining on duty when required by circumstances must be a definite, official, and special requirement of his position.
>
> (2) The employee must remain on duty not merely because it is desirable, but because of compelling reasons inherently related to continuance of his duties, and of such a nature that failure to carry on would constitute negligence.

1/ 5 C.F.R. § 550.151 (1976) paraphrases the statutory basis for AUO contained in 5 U.S.C. § 5545(c)(2)(1970) quoted above.

(3) The requirement that the employee is responsible for recognizing circumstances does not include such clearcut instances as, for example, when an employee must continue working because a relief fails to report as scheduled.

(d) The words "circumstances which require him to remain on duty" as used in § 550.151 mean that:

(1) The employee is required to continue on duty in continuation of a full daily tour of duty or that after the end of his regular workday, the employee resumes duty in accordance with a prearranged plan or an awaited event. Performance of only call-back overtime work referred to in § 550.112(f) does not meet this requirement.

(2) The employee has no choice as to when or where he may perform the work when he remains on duty in continuation of a full daily tour of duty. This differs from a situation in which an employee has the option of taking work home or doing it at the office; or doing it in continuation of his regular hours of duty or later in the evening. It also differs from a situation in which an employee has such latitude in his working hours, as when in a travel status, that he may decide to begin work later in the morning and continue working later at night to better accomplish a given objective.

(Emp. Exh. 1.)

The position of Deputy U.S. Marshal has been determined by the Department of Justice to meet generally the criteria set out in § 550.153 of the Civil Service Commission regulations. Holding the position of Deputy U.S. Marshal, however, does not in and of itself qualify an employee for administratively uncontrollable overtime pay. Under section 8(a) of Department of Justice Order 1551.4(a), dated August 1, 1975, an employee qualifies by performing, on an average of at least 3 hours of overtime work a week, such duties as surveillance, shadowing suspects, undercover work, meeting informers, examining records when the examination cannot be completed during regular duty hours, courtroom duty which is part of or incident to the employee's official work, guarding prisoners or detained witnesses, travel which involves the performance of actual work such as guarding prisoners in transport and return travel from such assignments, and travel which results from an event which could not be scheduled or controlled administratively, such as time spent traveling to appear as a Government witness. In addition, DOJ Order 1551.4(a), at section 8(b), identifies as examples of duties which do not qualify for AUO pay the following: early arrival or late departures from the office without official sanction; curtailed lunch period; eating lunch at the desk or serving process during the lunch period; traveling to or from Government-sponsored training classes; and time spent as a trainee or an instructor of scheduled training classes.

The rates of pay for AUO are established by 5 C.F.R. § 550.154 (1976):

§ 550.154 Rates of premium payable under § 550.151.

(a) An agency may pay the premium pay on an annual basis referred to in § 550.151 to an employee who meets the requirements of that section, at one of the following percentages of

that part of the employee's rate of basic pay which does not exceed the minimum rate of basic pay for GS-10:

(1) A position which requires an average of at least 3 but not more than 5 hours a week of irregular or occasional overtime work—10 percent;

(2) A position which requires an average of over five but not more than 7 hours a week of irregular or occasional overtime work—15 percent;

(3) A position which requires an average of over seven but not more than 9 hours a week of irregular or occasional overtime work—20 percent;

(4) A position which requires an average of over 9 hours a week of irregular or occasional overtime work—25 percent.

. . . . . .

(Emp. Exh. 1.)

Thus, a deputy may receive premium pay in the amount of 10, 15, 20, or 25 percent of his basic rate of pay. But an employee who has not previously averaged enough hours to meet the requirements of 10 percent premium pay would, until such time as he qualifies for AUO pay, receive 1 1/2 times the basic rate of pay for unscheduled overtime.

b. The Overtime Practices Within the U.S. Marshals Service

The determination of whether overtime will be paid at time and a half or at an AUO rate is made either in the Office of the Director of the Marshals Service or, at the district level, by the U.S. Marshal. Overtime rates for assignments which originate from the Washington, D.C., headquarters of the Employer, such as witness security details, are determined by the Office of the Director. Overtime determinations by U.S. Marshals are made on assignments which concern the day-to-day operations of each of the districts.

The Employer's decisions in both situations are based upon a determination as to whether regularly scheduled overtime would be appropriate.2/ Certain special assignments, however, such as guarding Government witnesses and sequestered juries, courtroom security, and transporting of Bureau of Prison prisoners require the U.S. Marshal to seek authorization from the Office of the Director to pay regular overtime. Such requests are made on the basis that there will be regularly scheduled overtime, and they are almost always granted.3/

2/ According to the parties, the Comptroller General has stated that regularly scheduled overtime means overtime which is scheduled in advance and ordered to recur on successive days or at specified intervals.

3/ The Union claims, in this regard, that many U.S. Marshals elect not to obtain authorization from Washington, D.C., to pay for these assignments at the time-and-a-half rate. Consequently, employees in such districts work at the lower AUO rate.

Deputy marshals who are dissatisfied with the Employer's disposition of overtime may utilize the agency grievance procedure. Unlike most grievances filed under this procedure, however, unresolved overtime grievances are not submitted to agency grievance examiners.4/ If the employee is dissatisfied with the results of the agency grievance procedure, he may file a claim with the Comptroller General and litigate the matter in court.

c. Court Suits Involving Deputy Marshals and the Employer

There are 6 pending court cases involving overtime claims of 200 deputy marshals, 3 in the United States Court of Claims and 3 in Federal District Courts. The issues involved are essentially the same: (1) Does the AUO statute apply to the deputy marshal as a position, and to the marshal's functions and duties in particular; i.e., should the deputy marshal or any of the marshal's duties be subject to the AUO premium payment in lieu of regular overtime? (2) Are overtime payments being consistently applied throughout the Marshals Service?

Two of the Court of Claims cases have been consolidated and will be tried in the spring of 1976; the third is expected to be consolidated with the others. One of the District Court cases went to trial on January 16, 1976, and has been taken under advisement. The other two District Court cases were filed on August 15 and December 3, 1975, and were in the discovery stage at the time of the factfinding hearing.

d. The Basic Dispute Between the Union and the Employer

The dispute concerning whether a deputy marshal should be paid overtime at the regular overtime rate or at an AUO rate has been a longstanding problem in the Marshals Service. The parties disagree fundamentally on what constitutes regularly scheduled work and what constitutes irregular and occasional overtime in many work situations. The Employer says that regular overtime is that which is normal, usual, and recurring; i.e., the overtime recurs on successive days in fairly predictable amounts. The Union, however, contends that the requirement for regularly scheduled overtime is fulfilled if the Employer schedules the overtime. It argues that if a U.S. Marshal decides not to schedule overtime which is recurring during a period of time, the employee will be paid at an AUO rate whereas, if it were scheduled overtime, he would be paid at time and a half. Furthermore, the Union avers that regular overtime is appropriate when, over a period of time, certain overtime assignments have developed a pattern as to their duration.5/

4/ In the grievance of John A. Jones, Grievance Examiner Thomas S. Templeton concluded that he had no "jurisdiction to make findings of fact and recommendations under the agency's grievance procedure in questions of pay. . . ."

5/ In this regard, the Employer periodically conducts surveys to establish whether assignments occur on a continuous or recurring basis.

e. Negotiations on Overtime and Standby

The Union initially made 19 proposals on overtime and standby. Fourteen were declared nonnegotiable by the Employer essentially on the basis that payment of overtime at a time-and-a-half rate for the work described in the Union's proposals would be in violation of statute and regulation.6/ The Union intends to pursue the negotiability procedures of the Order with respect to them. Negotiations on the five other proposals did not take place prior to the Panel's proceedings but two of them were resolved during the prehearing conference.

2. The First Overtime and Standby Issue—Article XX, Section 1

a. The Proposals

The Union made several proposals, the last of which was:

> All hours of work performed in excess of eight hours in any one day and all hours of work performed in excess of forty hours in one administrative workweek by an employee shall be overtime. All overtime shall be paid at the appropriate rate of pay.
> (Un. Exh. 5.)

The Employer made no proposal since it believes that the Agreement should not contain a provision with respect to this matter until the conclusion of the pending litigation.

b. The Union's Position

The Union argues that the Employer's existing methods of paying overtime are not consistent throughout the Marshals Service. This is due, it contends, to differing interpretations by U.S. Marshals and supervisors as to what is AUO and regular overtime, whether the work is scheduled, and whether the U.S. Marshal seeks authorizations for certain assignments which have been designated as being appropriately paid at time and a half. Thus, AUO and regular overtime rates are inconsistently paid for such duties as special assignments, witness

6/ The Union proposed, for example, that (1) overtime work which has been scheduled in advance will be paid at a rate of time and a half; (2) employees directed to report for overtime duty on either of their consecutive days off will be paid time and a half; (3) no employee will be required to work more than 16 consecutive hours of duty; (4) employees reassigned from training status to overtime duties will be compensated at time and a half; (5) no employee will be threatened with disciplinary or nonpromotion action for refusing to work overtime; (6) employees on a standby basis who are restricted to their residences will be compensated at time and a half; and (7) no employee will be required to work overtime in excess of the amount of overtime necessary to reach the maximum premium pay under AUO.

security, courtroom security, sequestered juries, and Saturday assignments within and between districts.7/ Arguing that employees in the Marshals Service should receive equal pay for equal work, the Union states that under its proposal "arbitration will establish the proper case law in the administration of the contract" where employees are not paid the appropriate rate of pay (Un. Br. 2).

With respect to the court suits on overtime, the Union contends that: they have nothing to do with the issue before the Panel because they pertain to the improper application of AUO to the duties of deputy marshals; its proposal does not alter the Employer's current method of paying overtime and is therefore distinguishable from the issues involved in the court suits; there is nothing which guarantees that the court suits will not be prolonged by appeals; it is willing to include a reopener provision in the contract to accommodate any court decisions which are in conflict with the contract's provisions; and the court's decisions will not satisfy the demonstrated need to have its proposal in the Agreement.

An employee should have a right under the contract to grieve inappropriate applications of overtime regulations, the Union affirms. It also contends that it is unfair to require an employee to make a claim on the overtime either through expensive, time-consuming court action or through the Comptroller General, particularly when the agency grievance procedure has shown itself to be unworkable in resolving employee problems.

c. The Employer's Position

The Employer contends in substance that: the Union's proposal is directly related to the court suits; the fundamental thrust of the Union's position has continually been that the Employer has been paying AUO where it should have been paying time and a half; and the Union's main concern in these negotiations has not been with the inconsistency in the Employer's application of its own regulations, but rather with what the Union believes to be the inconsistency between the regulations and the intent of Congress in passing the enabling legislation pertaining to administratively uncontrollable overtime. Although the AUO statute and the associated regulations have been in existence for 20 years, there has been very little litigation on the subject, the Employer points out.

7/ The Employer states that the differences in pay practices between districts are due to differences in operations from district to district. It notes, for example, that Saturday arraignments commonly occur in the Southern District of New York and Washington, D.C., resulting in regular and recurring overtime, and time and a half being authorized, but that in Richmond, Virginia, Saturday courts are rare and AUO is therefore paid. Several Union witnesses cited numerous cases where they had received (or knew of deputy marshals who had received) AUO premium pay or regular overtime for the same type of work.

Since the parties are in dispute over the meaning of the statutory language and since there is litigation pending before the courts which will clarify the meaning of AUO, the Employer concludes, the Union's proposed clause should not be incorporated in the Agreement until the litigation is completed. In this regard, it suggests that the resolution of these court suits is near.

The Employer further contends that inclusion of the Union's proposal in the contract would not resolve the dispute concerning the meaning and effect of the AUO statute, 5 U.S.C. § 5545(c)(2)(1970). Until that question is resolved by the courts, the Employer asserts, incorporation of the Union's proposal in the Agreement would cause additional controversy between the parties. Recourse to the grievance arbitration process would not in itself assure a final resolution to an overtime problem since an arbitrator's ruling is subject to appeal to the Federal Labor Relations Council and the Comptroller General. Additionally, the Employer avers, the Union would obtain an unfair advantage since employees could resort to the grievance arbitration process, and if they lose, take their case to the courts.

3. The Second Overtime and Standby Issue—Article XX, Section 9

a. The Proposals

The Union made several proposals with respect to Article XX, Section 9. Its final proposal is as follows:

> All overtime assignments within each district will be made, by the Employer, in a fair and equitable manner. If the need arises, a system of distributing overtime assignments within a district may be negotiated as a supplemental to this contract.
> (Un. Exh. 8.)

The Employer offered no counterproposals.

b. The Union's Position

The purpose of the Union's proposal is to assure that overtime is distributed in a fair and equitable manner. It believes that the proposal is necessary because it avers there are wide variations in the amount of overtime worked by employees in a particular district. In some districts employees work many hours over what is required for 25 percent AUO premium pay while other employees have not so qualified.8/

8/ In this regard, the Chief Deputy U.S. Marshal for the Southern District of New York stated that the distribution of AUO in his district was as follows: 6 deputy marshals at 10 percent premium pay; 13 at 15 percent; 5 at 20 percent; and 10 at 25 percent. Union witness Charles Burgess testified that the majority of employees in the Washington, D.C., office received the 25 percent AUO rate.

According to the Union, its proposal would result in a more equitable distribution of overtime within districts.

The Union objects to the Employer's suggestion that the issue of fair and equitable distribution of overtime be negotiated locally, because employees in each marshal's office should not be required to go through the long process of negotiations to ensure that overtime is distributed fairly and equitably when it can be uniformly established at the national level. The Union argues that, in the event of overtime problems at the local level, many employees would choose not to negotiate a local supplement to the national Agreement but instead would resort to the courts or the Comptroller General.

c. The Employer's Position

The Union's proposal is duplicative of provisions already in the Agreement which provide for local supplemental agreements concerning distribution of work assignments within a particular district. Thus, Article IV, Supplemental Local Agreements, Section 3, provides in pertinent part:

> Matters which may be included in supplemental agreements are:
>
> . . . . . .
>
> 2. Rotation of work assignments.
>
> . . . . . .
>
> 4. Fair and equitable distribution of overtime. . . .
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> (Jt. Exh. 1 at Article 4.)

Different methods for assigning overtime work have been adopted within the districts, the Employer states, and the general requirement of fair and equitable distribution of overtime would play havoc with some longstanding overtime systems. The Employer also avers that a negotiated supplemental agreement requiring the rotation of work assignments might conflict with the national Agreement requirement of a fair and equitable distribution of overtime.

It might be impossible under some circumstances, the Employer contends, for a local U.S. Marshal to implement the Union's proposal. Requirements that a certain deputy be given a particular assignment and the residence of a deputy with respect to the service of process at a particular location were noted in this regard.9/ While the Employer admits that these situations may result in unequal distribution of overtime, it notes that there have been no complaints and therefore the current system of assignments should not be changed. For all of these reasons, the Employer concludes that the distribution of overtime is a subject more appropriate for negotiation at the local level.

9/ Marshal John Twoomey testified that he currently was under court order to assign a particular deputy marshal on a regular basis to each of the 17 courts in the Northern District of Illinois. Chief Deputy Marshal Furka, however, stated that no deputies are specifically assigned to judges in the Southern District of New York.

4. <u>The Third Overtime and Standby Issue—Article XX, Section 11</u>

a. <u>The Proposals</u>

The Union proposes that:

> The Employer will not assign or permit an employee to work overtime on an A.U.O. basis solely to avoid paying any employee regular overtime.
> (Un. Exh. 11.)

No counterproposals were made by the Employer on this subject.

b. <u>The Union's Position</u>

The Union objects to the Employer assigning or permitting an employee to work at an AUO rate to avoid paying that employee or any other employee on a regular overtime basis. It is concerned with situations where employees may be intimidated into working at an AUO rate in lieu of regular overtime or where employees may be seeking to ingratiate themselves by working at the lower rate.10/ A proposal similar to the one described above, the Union asserts, was accepted by the Employer in 1973 local supplement negotiations involving the Southern District of New York. For these reasons, the Union maintains that its proposal should be adopted.

c. <u>The Employer's Position</u>

The Employer asserts that the Union's proposal has the same effect as its proposal on section 1 of the Overtime and Standby article. Consequently, the Employer's position is that no language should be placed in the contract until the court suits have been resolved.

<u>SCOPE OF THE GRIEVANCE PROCEDURE</u>

The issue at impasse is whether the scope of the grievance procedure should encompass overtime regulations and past practices.

1. <u>The Proposals</u>

The Union proposes that the following clause be incorporated in Article XXII, Grievance Procedure, of the new Agreement:

> <u>Section 2</u>. (2) Any matter involving working conditions or the interpretation and application of agency policies, regulations, past practices and practices not specifically covered by this agreement. The sole exclusion to this grievance procedure shall be those matters subject to statutory appeal procedures.
> (Un. Exh. 13.)

10/ Although there was no evidence that either situation has, in fact, occurred, Employer witness Twoomey testified that if no one on a duty team chooses to take an assignment at time and a half, he will make the assignment to someone else. If that man prefers to work at the AUO rate, Marshal Twoomey would honor the request.

The Employer's initial position was that the negotiated grievance procedure should cover only the interpretation and application of the Agreement. Its current proposal is:

> The negotiated grievance procedure should apply to the application or the interpretation of the agreement or agency regulations other than overtime.
> (Tr. 663.)

2. The Union's Position

The Union states that its proposal establishes a single, fair system for resolving employee problems, thereby reducing the number of forums for settling such disputes. Alleging that the negotiability decisions of the Federal Labor Relations Council have limited the scope of bargaining, the Union contends that it is only fair that it should be granted the broadest scope for the negotiated grievance and arbitration procedure.

Additionally, it argues that the exclusion of past practices from the scope of the grievance procedure would have the effect of making nugatory the previously negotiated past practices provision. This provision states:

> In accordance with Executive Order 11491, as amended, it is agreed that any prior benefits and personnel policies and practices which do not conflict with this Agreement will continue in effect unless changed by mutual consent of the parties.
> (Jt. Exh. 1 at Article XXXVI.)

Past practices should be within the scope of the grievance procedure, the Union asserts, in order to ensure that management will not unilaterally discontinue them. In this regard, the Union cites several grievances and court suits concerning such matters as merit promotion, assignments, and health and safety which, it contends, demonstrate the need for its proposal. Without a reference to past practices in the grievance procedure its only recourse, the Union states, is to the unfair labor practice procedures of the Order which are unduly time consuming.

The Union argues that the proposals on overtime which are before the Panel cover only some of the problems. Accordingly, overtime regulations should be subject to the grievance procedure so that all possible disputes involving overtime will be encompassed. The arbitration process is less expensive and more expeditious than court litigation, the Union contends.

3. The Employer's Position

Because of the limited bargaining history here, the Employer argues, the grievance procedure should not cover past practices until the parties

have had more experience in dealing with one another at the local level. In this regard, the Employer claims that, with the exception of a few locals, there are basically no relationships at the local level. In addition, it asserts that unnecessary grievances will be generated by inclusion of past practices under the negotiated grievance procedure because no one understands what they are. It sees the use of the phrase "past practices" as a catchall for everything the Union does not like.

The Employer is also opposed to including overtime regulations within the scope of the grievance procedure for the same reasons underlying its position with respect to section 1 of the Overtime and Standby article.

DISCUSSION

We have reviewed the record in this case, including the factfinder's report and the comments made with regard to it. The impasse arises out of a disagreement between the parties on these basic questions: whether the Agreement should cover certain overtime matters, and whether certain subjects should be excluded from the scope of the grievance procedure.

With respect to the first of the three overtime issues, the parties differ over what constitutes regular overtime and what is administratively uncontrollable overtime, as those terms are applied in the Marshals Service. This is an important matter, of course, because of the higher rate of pay which attaches to regular overtime. The Union proposes that the Agreement provide that overtime be paid at the "appropriate" rate of pay, contending that such provision will lead to more consistent application of overtime regulations throughout the Marshals Service. The Employer, on the other hand, prefers to see the contract silent on this matter until a number of pending court suits are resolved.

Section 13(a) of the Order provides that the negotiated grievance procedure "shall be the exclusive procedure available to the parties and the employees in the unit for grievances which fall within its coverage." Because overtime is a daily occurrence in the Marshals Service, it would be more constructive to the day-to-day relationship of the parties if essentially all problems concerning the appropriate rate of overtime pay were to be resolved through the mechanism of the parties' Agreement rather than through other forums. Furthermore, arbitral review of overtime disputes may have the salutary effect of increasing the consistency and fairness of overtime determinations by the Employer. The Panel concludes, therefore, that the Union's proposal on the first overtime issue should be adopted by the parties.

The Employer contends that the Union's proposal that overtime assignments within each district be made in a fair and equitable manner is unnecessary because the parties have already agreed in article IV that the subject of fair and equitable distribution of overtime is a

matter appropriate for local supplemental agreements. We agree that such a provision in the national Agreement is not necessary at this time. Despite the Union's contention, the record does not establish that there are generally wide disparities in the amount of overtime worked by employees within particular districts. If such disparities exist, article IV permits correction of any inequities in the distribution of overtime through negotiations at the district level. Therefore, the Panel concludes that the Union should withdraw its second overtime proposal.

In its third overtime proposal the Union seeks to prevent the Employer from assigning an employee to work at an AUO rate solely to avoid paying that employee or another employee at the regular overtime rate. For essentially the same reasons underlying its position on the first overtime issue, the Employer prefers that the contract not speak to this matter. We view the Union's proposal as stating, in another way, its desire that employees be paid overtime at the appropriate rate of pay. Since this matter will be taken care of under the terms of the Union's first overtime proposal, we conclude that there is no need for this provision in the parties' negotiated Agreement.

The parties disagree on whether overtime regulations and past practices should be excluded from the scope of the grievance procedure. With regard to overtime regulations, we have previously concluded that the Agreement should contain a clause providing that overtime should be paid at the appropriate rate of pay. Thus, all disputes between the parties on this subject would normally be channeled through the negotiated grievance and arbitration procedure. This worthwhile objective, however, would be undercut if arbitrators were unable to interpret agency regulations relating to overtime issues. Indeed, the record before us discloses a multiplicity of agency regulations which are clearly connected with the administration of overtime in the Marshals Service. They could not be excluded from the purview of arbitration, in our judgment, without impeding the ability of the arbitrator to render a meaningful award on this subject.

Finally, the past practices clause which the parties have already negotiated would serve little purpose if it is excluded from the scope of the grievance procedure.

For the reasons stated above, we conclude that overtime regulations and past practices should not be excluded from the scope of the grievance procedure. The clause which we recommend be adopted, by covering disputes over the interpretation and application of the Agreement and agency policies and regulations, but excluding only matters subject to statutory appeal procedures, will accomplish that end. It is broad enough, moreover, to meet the needs of the parties as reflected in the record herein.

RECOMMENDATIONS

The Panel makes the following settlement recommendations:

1. The First Overtime Issue

That the Union's proposal be adopted and the parties incorporate the following provision in Article XX:

> All hours of work performed in excess of eight hours in any one day and all hours of work performed in excess of forty hours in one administrative workweek by an employee shall be overtime. All overtime shall be paid at the appropriate rate of pay.

2. The Second Overtime Issue

That the Union's proposal be withdrawn.

3. The Third Overtime Issue

That the Union's proposal be withdrawn.

4. Scope of the Grievance Procedure Issue

That the parties incorporate the following provision in Article XXII:

> The negotiated grievance procedure shall cover disputes over the interpretation and application of the Agreement and agency policies and regulations, but shall exclude matters subject to statutory appeal procedures.

By direction of the Panel.

Howard W. Solomon
Executive Secretary
Federal Service Impasses Panel

April 30, 1976
Washington, D.C.